NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

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CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

IVAN VON STAICH, Petitioner - Appellant, v. JAMES HAMLET, Warden, Respondent - Appellee.	No. 04-16011 D.C. No. CV-02-05305-PJH MEMORANDUM*

IVAN VON STAICH, Plaintiff - Appellant, v. LINDA L. RIANDA; CHIEF INMATE APPEALS BRANCH THIRD LEVEL; A. TOMASETTI, CTF-Soledad Captain; J. L. CLANCY, Captain, Defendants - Appellees.	No. 06-17026 D.C. No. CV-04-02799-PJH

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Appeal from the United States District Court
for the Northern District of California
Phyllis J. Hamilton, District Judge, Presiding

Argued and Submitted September 27, 2007[**]
San Francisco, California

Before: GIBSON[***], TASHIMA, and BERZON, Circuit Judges.

Ivan Von Staich brings these consolidated appeals from dismissal of a habeas claim and dismissal of a civil action for injunctive relief and damages under 42 U.S.C. § 1983, the Americans with Disabilities Act ("ADA"), and the Religious Land Use and Institutionalized Persons Act ("RLUIPA"). We have jurisdiction over his habeas appeal under 28 U.S.C. § 2253 and over his appeal from dismissal of his civil action under 28 U.S.C. § 1291. We affirm dismissal of plaintiff's habeas petition. We affirm dismissal of plaintiff's § 1983 claim and reverse dismissal of his ADA claim. We also reverse the district court's holding that Von Staich's claim for injunctive relief under RLUIPA is moot, and remand to allow plaintiff leave to amend his complaint.

[**] Appeal No. 04-16011 was argued; however, Appeal No. 06-17026 was submitted for decision without oral argument pursuant to Fed. R. App. P. 34(a)(2).

[***] The Honorable John R. Gibson, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

1. Von Staich, an inmate of California state prison, is a Nazirite Christian and believes that his religion dictates that he not cut his hair or beard. Von Staich brought a petition for habeas corpus alleging that he was being punished for his religious beliefs in violation of RLUIPA because of his refusal to comply with prison grooming regulations. The district court dismissed his habeas petition as unexhausted and procedurally defaulted. On appeal, Von Staich does not contest the holdings that his petition was unexhausted and procedurally defaulted, but argues that the district court should have converted his habeas petition into an RLUIPA claim. Von Staich has, however, already filed a complaint and litigated a case alleging violation of RLUIPA on the same grounds contained in his habeas petition. As a result, his habeas appeal is moot and must be dismissed. *In re Burrell*, 415 F.3d 994, 998 (9th Cir. 2005) (a court cannot grant any effectual relief and an appeal is moot where a plaintiff has already received all the relief he sought).

2. Von Staich brought a civil action against officials of the California Department of Corrections under 42 U.S.C. § 1983, the ADA, and RLUIPA. After dismissing several other defendants from the suit, the district court dismissed the § 1983 claim against defendant Linda Rianda for failure to state a claim, dismissed Von Staich's claims for injunctive relief as moot because of changes in prison

regulations, dismissed his ADA claim as unexhausted, and held that Rianda was entitled to qualified immunity on the RLUIPA claim.

a. The district court held that Von Staich failed to state a claim under 42 U.S.C. § 1983 for violation of his constitutional rights because there is no right to a particular administrative grievance procedure. *See Ramirez v. Galaza*, 334 F.3d 850, 860 (9th Cir. 2003) ("inmates lack a separate constitutional entitlement to a specific prison grievance procedure"); *Mann v. Adams*, 855 F.2d 639, 640 (9th Cir. 1988) ("there is no legitimate claim of entitlement to a grievance procedure"). Von Staich, however, does not allege that he was denied his right to bring an administrative appeal or that he was denied a particular administrative procedure. He alleges, rather, that Rianda's failure to provide him an exemption from the grooming regulations denied him his rights under the First Amendment of the Constitution.

Nonetheless, we affirm the dismissal of Von Staich's First Amendment cause of action. Prison hair-length and beard regulations do not violate the First Amendment. *See Henderson v. Terhune*, 379 F.3d 709, 715-16 (9th Cir. 2004) (California Department of Corrections hair-length restriction does not violate First Amendment); *Friedman v. Arizona*, 912 F.2d 328, 333 (9th Cir. 1990) (Arizona

prison regulation banning beards did not violate First Amendment). We therefore affirm dismissal of plaintiff's claims under 42 U.S.C. § 1983.

b. The district court erred in dismissing Von Staich's ADA claim for failure to exhaust.[1] The Prison Litigation Reform Act ("PLRA") requires prisoners to exhaust their state administrative remedies before filing suit in federal court, and the exhaustion requirements of the PLRA apply to the ADA. *See* 42 U.S.C. § 1997(e)(a); *Butler v. Adams*, 397 F.3d 1181 (9th Cir. 2005) (applying PLRA exhaustion requirement to claim under the ADA). Defendants bear the burden of raising and proving non-exhaustion under the PLRA. *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003).

As in *Wyatt*, the state has not carried its burden of proving non-exhaustion. The declarations provided by the state do not allege that Von Staich failed to exhaust his appeals. *Id*. Nor does the log of exhausted appeals demonstrate that none of the fourteen exhausted appeals listed was related to Von Staich's ADA claim. Although the district court is correct that Von Staich did not prove that he exhausted his ADA claim, Von Staich did not bear the burden of proving

[1] Von Staich does not mention his ADA claim in his opening brief on appeal. The defendants, however, raised the ADA claim in their response. As the plaintiff is pro se, we exercise our discretion to reach the claim. *See United States v. Ullah*, 976 F.2d 509, 514 (9th Cir. 1992).

exhaustion. We therefore reverse dismissal of plaintiff's ADA claim and remand for further proceedings.

c. The district court dismissed Von Staich's claims for damages under RLUIPA as barred by qualified immunity, and his claims for injunctive relief under RLUIPA as moot.

Government officials are entitled to qualified immunity "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). *See Doe by and Through Doe v. Petaluma City Sch8 Dist*., 54 F.3d 1447, 1450 (9th Cir. 1995) (applying qualified immunity analysis to alleged statutory violation of Title IX). At the time of Rianda's alleged actions, only seventeen federal court decisions had been issued citing RLUIPA. Only one case, *Toles v. Young*, 2002 WL 32591568 (W.D. Va. 2002), addressed prison grooming regulations, and it held that the regulations did not violate RLUIPA. *Id*. at *10. A reasonable official would thus not have had reason to know that failure to provide a religious exemption from prison grooming

regulations for either hair or beards violated RLUIPA. The district court's dismissal of the damages claims is therefore affirmed.[2]

With regard to Von Staich's claims for injunctive relief under RLUIPA, a case is moot when a plaintiff has received all of the relief he requested in his complaint. *See NASD Dispute Resolution, Inc. v. Judicial Council*, 488 F.3d 1065, 1068 (9th Cir. 2007) (holding that appeal was moot because other circumstances had already provided plaintiffs "the relief sought by them in this case"). The "party asserting mootness bears a 'heavy burden of establishing that there is no effective relief remaining for a court to provide.'" *United States v. Strong*, 489 F.3d 1055, 1059 (9th Cir. 2007) (quoting *GATX/Airlog Co. v. U.S. Dist. Court*, 192 F.3d 1304, 1306 (9th Cir. 1999).

The district court dismissed Von Staich's claims for injunctive relief as moot because the CDC adopted new regulations "which prevent[] future action against plaintiff for over-long hair"; "prison authorities held a special classification committee meeting in which plaintiff was retroactively returned to A-1-A status"; and "the rule violations report was 'removed' and good time restored." The record

[2] Von Staich also argues that the district court erred in dismissing his claims against defendant "A. Tomasetti" in his individual capacity for failure to achieve service within 120 days. Fed. R. Civ. P. 4(m). Any Rule 4 error, however, is harmless, because Tomasetti would also be entitled to qualified immunity for his actions.

shows, however, that only one of the six rule violation reports referred to by Von Staich in his complaint has been removed from his record.[3] Moreover, there is evidence in the record that Von Staich attempted to inform the court in two letters dated March 3 and March 8, 2006 that he continues to be punished under the new prison grooming regulations due to his long beard.

We therefore reverse the district court's dismissal of Von Staich's injunctive relief claims as moot, and remand to allow plaintiff leave to amend his complaint to allege ongoing punishment for his overlong beard. *See Verizon Del., Inc. v. Covad Comm'ns Co.*, 377 F.3d 1081, 1091 (9th Cir. 2004) (Federal Rule of Civil Procedure 15(a) embodies a "policy favoring liberal amendment"); *Lira v. Herrera*, 427 F.3d 1164 (9th Cir. 2005) (noting that "leave to amend should be . . . granted more liberally to pro se plaintiffs") (*quoting Ramirez v. Galaza*. 334 F.3d 850, 861 (9th Cir. 2003)) (internal quotation marks and alterations omitted).

AFFIRMED in part, **REVERSED** in part, and **REMANDED**.

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[3] Von Staich attached six rule violation reports, dated May 17, 1998, June 28, 1998, September 14, 1998, October 23, 2001, November 12, 2001, and November 15, 2001, to his complaint and requested that defendants be ordered to "remove . . . all . . . rule violations concerning . . . violation of the prison grooming standards." The classification review document cited by the defendants in support of their claim that Von Staich has received all the relief he requested indicates that a single rule violation report dated November 15, 2001 was removed.